

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 21, 2005

IN RE:

BELLSOUTH'S PETITION TO ESTABLISH
GENERIC DOCKET TO CONSIDER AMENDMENTS
TO INTERCONNECTION AGREEMENTS RESULTING
FROM CHANGES OF LAW

DOCKET NO.
04-00381

ORDER DENYING MOTION FOR CLARIFICATION

This matter came before Chairman Ron Jones, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on August 8, 2005 for consideration of the *Motion for Clarification* filed on May 23, 2005 by Cinergy Communications Company ("Cinergy") and of *Momentum Telecom's Motion in Support of Cinergy Communications Company's Motion for Clarification*, filed June 27, 2005.

Background

BellSouth Telecommunications, Inc. ("BellSouth") initiated this docket to address decisions of the Federal Communications Commission ("FCC") and the United States Court of Appeals for the District of Columbia Circuit related to local unbundling rules, including the *Triennial Review Order* ("TRO")¹ and the FCC's "final" unbundling rules, later released as the

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, aff'd in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("TRO")

Triennial Review Remand Order (“*TRRO*”).² BellSouth asserted that these decisions mandated changes in the interconnection agreements between BellSouth and the competing local exchange carriers (“CLECs”). BellSouth asked the TRA to determine what changes to the agreements would be necessary to implement the new rules. Several CLECs sought intervention in this docket, and those interventions were granted.³

The *TRRO*, released by the FCC on February 4, 2005, reclassified specific unbundled network elements (“UNEs”) and altered the obligations of incumbent local exchange carriers, such as BellSouth, to provide those UNEs to CLECs. The *TRRO* also set forth transition plans for the UNEs, which distinguished CLECs’ ongoing service to their embedded customer bases from new orders for the de-listed UNEs (“New Adds”).

BellSouth and the CLECs (together, the “Parties”) had opposing interpretations of the *TRRO* provisions. BellSouth took the position that the termination of New Adds was self-effectuating as of the effective date of the *TRRO* and BellSouth therefore was not required to provide New Adds after March 10, 2005. BellSouth issued carrier notification letters informing the CLECs that BellSouth would not accept orders for New Adds as of March 11, 2005.⁴

The CLECs responded that the reclassification of UNEs was a change as contemplated by the change-of-law provisions in their interconnection agreements with BellSouth.⁵ The CLECs therefore asserted that BellSouth would be breaching or unilaterally amending its interconnection agreements with the CLECs if it began rejecting orders for New Adds as of March 11, 2005.⁶

² *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, *Order on Remand*, 20 FCC Rcd 2533 (2005) (“*TRRO*”).

³ For a detailed history of this docket, see *Order Granting Alternative Relief Requested in Motions for Emergency Relief*, pp 2-10 (July 13, 2005).

⁴ See, e.g., *MCI's Motion for Expedited Relief Concerning UNE-P Orders*, Exhibits A-G (March 2, 2005)

⁵ See *id.*; *Cinergy Communications Company's Motion for Emergency Relief*, Exhibits 2-3 (March 2, 2005)

⁶ *Id.*

Several CLECs filed motions for emergency relief with the TRA (“*Emergency Relief Petitions*”).⁷ BellSouth responded in opposition.⁸ The Parties presented oral argument before the panel during the regularly scheduled Authority Conference held on March 14, 2005.

The panel convened for deliberations on April 11, 2005 to consider the *Emergency Relief Petitions*. At that time, a majority of the panel (“Majority”)⁹ ordered BellSouth and the CLECs to negotiate an appropriate implementation of the *TRRO* provisions concerning de-listed UNEs and the availability of commingling and conversion provided in the *TRO*. The Majority set an initial negotiation period of thirty days, through May 11, 2005.¹⁰ The Majority also directed BellSouth to “continue to accept, and not reject, CLEC orders for New Adds” during the negotiation period and until further notice from the Authority.¹¹

During a status conference on May 2, 2005, the Parties reported that their negotiations had been unsuccessful and that they had a “fundamental disagreement” regarding some of the pending issues.¹² The Hearing Officer noted that the negotiation period was due to expire on May 11, 2005, five days before the next regularly scheduled Authority Conference on May 16, 2005.¹³ BellSouth agreed to extend the time during which it would continue accepting New

⁷ See *Motion for Emergency Relief* (February 25, 2005) (filed by NewSouth/NuVox Communications, Inc., KMC Telecom V, Inc. and KMC Telecom III, LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Chattanooga, LLC), *MCI's Motion For Expedited Relief Concerning UNE-P Orders* (March 2, 2005), and *Cinergy Communications Company's Motion for Emergency Relief* (March 2, 2005).

⁸ *BellSouth Telecommunications Inc.'s Response in Opposition to the Joint Petitioners' Motion for Emergency Relief* (March 8, 2005); *BellSouth Telecommunications Inc.'s Response to Cinergy Communications Company's Motion for Emergency Relief* (March 10, 2005), and *BellSouth Telecommunications Inc.'s Response to MCI's Motion for Expedited Relief Concerning UNE-P Orders* (March 10, 2005).

⁹ Director Kyle did not vote with the majority and instead moved that BellSouth's responsibility to continue furnishing UNEs exempted by the *TRRO* ended on March 11, 2005. See Transcript of Deliberations, p. 18 (April 11, 2005); Supplement to Transcript of April 11, 2005 Deliberations (November 7, 2005).

¹⁰ See Transcript of Deliberations, pp. 9, 13-14 (April 11, 2005). At that time, the TRA was scheduled to have an Authority Conference on May 2, 2005, before the expiration of the negotiation period. The TRA later cancelled the May 2, 2005 Authority Conference. See Transcript of Status Conference, pp. 3, 42-45 (May 2, 2005).

¹¹ *Order Granting Alternative Relief Requested in Motions for Emergency Relief*, p. 14 (July 13, 2005).

¹² See Transcript of Status Conference, pp. 29-31 (May 2, 2005).

¹³ *Id.* at 3, 42-45.

Adds through May 16, 2005 to allow deliberations by the Panel at the May 16, 2005 Authority Conference.¹⁴

During the May 16, 2005 Authority Conference, the Majority¹⁵ noted that the negotiation period provided as alternative relief in the April 11, 2005 deliberations had expired. The Majority found that the negotiations between BellSouth and the CLECs had been unsuccessful and that further negotiations were not likely to yield results or agreement among the Parties.¹⁶ The Majority, therefore, concluded that the alternative relief should not be extended and should end.¹⁷ On July 25, 2005, the Authority issued the *Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations* (“*Order Terminating Alternative Relief*”) memorializing the findings of the Majority at the May 16, 2005 Authority Conference.

Positions of the Parties

On May 23, 2005, Cinergy filed its *Motion for Clarification* seeking clarification of the Majority’s oral ruling made during the May 16, 2005 Authority Conference. Specifically, the *Motion for Clarification* stated that the TRA did not address whether BellSouth may refuse to process orders to serve existing CLEC customers that are in the “embedded customer base” for which the FCC provided a one-year transition period.¹⁸ Cinergy requested “that the TRA clarify its ruling and expressly hold that BellSouth is required to continue providing service to Cinergy’s embedded base, including moves, adds, and change orders, when requested by the customer.”¹⁹

On June 2, 2005, BellSouth filed *BellSouth Telecommunications, Inc.’s Response to Cinergy’s Motion for Clarification* (“*BellSouth’s Response*”). BellSouth argued that the

¹⁴ *Id.* at 43-45.

¹⁵ Director Kyle did not vote with the Majority on May 16, 2005, but instead reiterated her position from the April 11, 2005 deliberations that the FCC expressly prohibited New Adds after March 11, 2005 and beginning on March 11, 2005 BellSouth has not been and is not required to furnish the de-listed UNEs

¹⁶ Transcript of Authority Conference, pp. 34, 36-37 (May 16, 2005).

¹⁷ *Id.* at 33, 35, 47.

¹⁸ *Motion for Clarification*, p. 1 (May 23, 2005)

¹⁹ *Id.* at 6.

Authority's May 16, 2005 ruling was clear and the relief requested by Cinergy would contradict the language and purpose of the *TRRO*. BellSouth urged the Authority to deny Cinergy's *Motion for Clarification* or, in the alternative, treat the *Motion for Clarification* as a motion for reconsideration and defer ruling on it until after the Authority entered a written order memorializing the May 16, 2005 ruling.

Momentum Telecom, Inc. ("Momentum") filed *Momentum Telecom's Motion in Support of Cinergy Communications Company's Motion for Clarification* ("*Momentum's Motion in Support*") on June 27, 2005. Like Cinergy, Momentum asserted that the Majority's May 16, 2005 ruling did not address the terms and conditions under which CLECs may continue providing service to existing CLEC customers in the "embedded customer base."²⁰ Momentum joined with Cinergy in "asking the TRA to rule that BellSouth must continue to bundle moves, adds, and changes for the embedded base of UNE-P customers during the transition period."²¹

Findings and Conclusions

During the August 8, 2005 Authority Conference, the panel considered Cinergy's *Motion for Clarification*, *BellSouth's Response*, and *Momentum's Motion in Support*. The Majority concluded that Cinergy's *Motion for Clarification* and *Momentum's Motion in Support* should be denied.²² The May 16, 2005 ruling was clear and was clearly set forth in the July 25, 2005 *Order Terminating Alternative Relief*. The order expressly stated, "Effective May 16, 2005, BellSouth is no longer required to provide New Adds and may reject any and all new orders for the de-listed UNEs, including new orders to serve the CLECs' embedded base of customers."²³ The

²⁰ *Momentum's Motion in Support*, p. 1 (June 27, 2005)

²¹ *Id.*

²² Director Kyle abstained from the vote, Director Kyle did not vote with the Majority on April 11, 2005 when they granted the alternative relief or on May 16, 2005 when they terminated it and therefore took no position on whether the Majority should clarify the May 16 ruling. Transcript of Authority Conference, p. 22 (August 8, 2005)

²³ *Order Terminating Alternate Relief Granted During April 11, 2005 Deliberations*, p. 4 (July 25, 2005)

Majority found that the *Order Terminating Alternative Relief* specifically addressed the issues raised by Cinergy and Momentum and rendered their motions moot.

IT IS THEREFORE ORDERED THAT:

The *Motion for Clarification*, filed by Cinergy Communications Company on May 23, 2005, and *Momentum Telecom's Motion in Support of Cinergy Communications Company's Motion for Clarification*, filed June 27, 2005, are denied.



Ron Jones, Chairman



Deborah Taylor Tate, Director

Sara Kyle, Director